Supreme Court, U.S.
FILED

991329 FEB 03 2000

OFFICE OF THE CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES

THELMA VIRGINIA GRAYSON,
Administrator of the Estate of Gerald Anthony Collins,
Petitioner,

v.

M.E. ROYER,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

NEIL L. HENRICHSEN
Counsel of Record
HENRICHSEN SIEGEL, P.L.L.C.
1850 M Street, N.W. Suite 250
Washington, D.C. 20036
(202) 293-7766
Attorney for Petitioner
February 3, 2000

QUESTION PRESENTED

Is failure to provide a medical procedure or treatment to a pretrial detainee suffering from a drug overdose, while in the custody of a police officer, deliberate indifference to serious medical needs in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution?

PARTIES TO THE PROCEEDING

Petitioner Thelma Virginia Grayson, Administrator of the Estate of Gerald Anthony Collins. Carl R. Peed as the Sheriff of Fairfax County, Virginia, M.E. Royer, and Fairfax County Board of Supervisors were parties to the underlying action. Only M.E. Royer is a Respondent.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

The Underlying Events 3

The Proceedings Below 8

REASONS FOR GRANTING THE PETITION .9

I. THE PETITION SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT'S RULING THAT AN ARRESTING OFFICER CANNOT BE LIABLE FOR DELIBERATE

INDIFFERENCE TO SERIOUS MEDICAL NEEDS WHEN THERE IS A DRUG OVERDOSE INVOLVED IS IN CONFLICT WITH RULINGS BY THIS HONORABLE COURT AND ANOTHER COURT OF APPEALS 9

II. **THE PETITION SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT'S HOLDING THAT THERE IS A DISTINCTION BETWEEN EXTERNAL AND INTERNAL INJURY WHEN CONSIDERING WHETHER A SERIOUS MEDICAL NEED EXISTS IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE ANSWERED BY THIS COURT**. 11

CONCLUSION 12

APPENDIX . . . . . Attached

TABLE OF AUTHORITIES

Cases: Page

Estelle v. Gamble, 429 U.S. 97, 104,
97 S. Ct. 285, 50 L. Ed. 2d 251 (1976). 10
Garcia v. Salt Lake Co., 768 F. 2d 303
(10th Cir. 1985) 10, 11
Statutes:
42 U.S.C. § 1983 2

No.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 2000

THELMA VIRGINIA GRAYSON,
Administrator of the Estate of Gerald Anthony Collins,
Petitioner,

v.

M.E. ROYER,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Thelma Virginia Grayson, Administrator of the Estate of Gerald Anthony Collins ("Mrs. Grayson"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's decision, published at 195 F.3d 692, is reproduced in the Appendix (App.) at 1a. The

district court's memorandum opinion and order dismissing Mrs. Grayson's case is reproduced at App. 12a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered November 5, 1999. This Court has jurisdiction to issue the writ under 28 U.S.C. § 1245(1).

STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. § 1983, which states, in pertinent part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . .

The Fourteenth Amendment to the United States Constitution is also relevant.

STATEMENT OF THE CASE

A. The Underlying Events

On March 25, 1995, Marjorie Mascarinas, a security officer at Hecht's department store at the Tyson's Corner Mall in Virginia, was summoned with a partner to a men's room there. Mascarinas, who was also a nursing student, observed a black male "on the floor, on his back, feet against the wall," talking-loudly "about God and the devil and things of that sort." He did not appear violent, nor did he appear to pose a physical threat to anyone. The man was Gerald Anthony Collins, a thirty-five year old African-American male, who had spent the afternoon shopping with his thirteen year old daughter Phyllis.

At the request of her partner, Mascarinas called 911 and told the operator that an ambulance was needed for a man who was "acting crazy." She believed calling an ambulance "was the common sense thing to do." Thereafter, M.E. Royer, a Fairfax County Police Officer on off-duty employment at the Mall, came on the scene.

Royer had monitored a radio call concerning a possible mental case in the restroom. At the entrance to the restroom, he saw Mascarinas and, inside the restroom, two male Hecht's security officers with Mr. Collins. Fairfax County training of Police Officers directed that one

of the first things an officer in Royer's situation *should* have done was to speak with the security guards. Royer, however, did not speak with the security guards, but immediately approached Mr. Collins who was laying on the floor of the restroom repeating over and over "I love everyone."

Royer's Investigation Report and Answers to Interrogatories describe the ensuing events as follows: (1) Royer "attempted to interview Mr. Collins but he began to chant Islamic phrases. At this time Mr. Collins started to become violent. Along with the help of Mr. Tom Peltier and Mr. Jason Moses from Hechts [sic] Security I placed Mr. Collins into custody." (2) Royer requested "an on-duty supervisor to come to the scene by radio." (3) "Upon a search of his [Mr. Collins'] black backpack which he was carrying I discovered 2 35mm film containers which contained parsley laced with a large quantity of PCP and the other with marijuana." (4) "Ofc Cole and Pappas responded along with Ofc Wahrhaftig." "At that point, Mr. Collins began kicking and Officers Cole, Pappas, and Wilder and I further restrained Mr. Collins by using the Subject Immobilization Technique (ankles flexicuffed and hands flexicuff secured by two sets of handcuffs) for his and our safety."

At his deposition, however, Royer admitted that each of these four points, which he had included in his

official Report of Investigation and his sworn Answers to Interrogatories, was incorrect. First, Mr. Collins did not "become violent" at any time prior to Royer handcuffing him and, in fact, did not even resist when Royer placed the first cuff on Mr. Collins' hand. Mr. Collins only began to resist when Royer was attempting to place the second handcuff. Second, Royer, alone and prior to the arrival of any other officers, restrained Mr. Collins in the SIT position. Third, Royer did not request an on-duty supervisor to come to the scene. Fourth, Mr. Collins was not "carrying" the backpack; it was found in the restroom. Fifth, although Royer recognized marijuana as one of the substances in the film canisters taken from the backpack, the substance in the second canister was unknown to him. Royer showed this canister to Officer Wahrhaftig, who had arrived by the time of the search and stated it smelled like PCP.

After other officers arrived and the search of the backpack had taken place, Royer believed Mr. Collins was high on PCP. Sergeant Byrd, the highest ranking officer on the scene when he arrived, told the radio dispatcher Mr. Collins was **"Most likely PCP overdose."**

General guidelines for the Fairfax County Police provided that if an officer believed an individual had overdosed, then the officer "would have to call rescue and

have rescue transport [the individual] to the hospital." Training also specifically indicated that persons believed to be under the influence of PCP should be treated at a hospital. Further, Plaintiff's expert, Mr. Klotz, opined that police authors/trainers advocate that when persons are temporarily mentally disturbed due to ingestion of hallucinogenic drugs such as PCP they "should be committed to a medical facility and not a jail cell." Notwithstanding such training and guidelines, medical assistance was not requested or obtained.

The ADC was notified Mr. Collins was en route, was disorderly, and possibly on PCP. Upon his arrival, a Sheriff's deputy escorted Mr. Collins to the Magistrate area where Mr. Collins started to make references to a traffic ticket in a loud voice. He kept repeating, in an intoxicated speech, "I can't believe this is all over a traffic ticket." Wright believed Mr. Collins was under the influence of PCP.

After the arraignment, deputies escorted Mr. Collins to the booking area. It was obvious to everyone at the booking area that Mr. Collins was under the influence. Mr. Collins was still asking questions about the traffic ticket and where "the girl" was. He was not following simple commands, his speech was slurred, and questions to him had to be repeated two or three times. One deputy testified that he did not think Mr. Collins was rational.

According to Royer, Mr. Collins was "too high on PCP to control."

Mr. Collins was admitted into the ADC at approximately 9:00 p.m. on March 25, 1995. During the morning of March 26, 1995, Mr. Collins was moved from his cell by force and taken to cell R-32 and placed in four-point restraints. Deputies twice looked into R-32 and did not see any movement, blinking, or respiration of Mr. Collins' chest, and found Mr. Collins unresponsive upon closer examination. Medics then checked Mr. Collins' pulse and said he was okay. Mr. Collins was thereafter found not breathing by another deputy, and CPR was initiated by ADC staff and continued until a rescue unit took him to a hospital.

Mr. Collins arrived at Fairfax Hospital during the morning of March 26, 1995. It was soon determined that he was brain dead and had suffered congestive heart failure. Mr. Collins was taken off life support and was pronounced dead on March 27, 1995.

Francis P. Field, M.D., a Virginia Assistant Chief Medical Examiner, determined that the primary cause of Mr. Collins' death was PCP poisoning. Dr. Field specifically concluded that the drug level found in Mr. Collins' body was an "overdose level."

B. The Proceedings Below

Mrs. Grayson filed the case in the Fairfax County, Virginia, Circuit Court on January 23, 1998. The case was removed to the United States District Court for the Eastern District of Virginia on April 30, 1998. Jurisdiction of the district court was based upon 28 U.S.C. § 1331.

By Order and Memorandum Opinion dated November 20, 1998, the district court granted all defendants' motions for summary judgment ruling, *inter alia*, that Royer was not deliberately indifferent to Mr. Collins' medical needs because Mr. Collins merely appeared "high" and had no obvious physical problems. App. 21a.

Mrs. Grayson timely appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's order. The court of appeals acknowledged that an expert witness testified that Royer should have committed Mr. Collins to a medical facility, yet the panel concluded that since Collins exhibited to Royer "no visible external injuries" there was no objective evidence available to Royer that Collins had a serious need for medical care. App. 5a.

Although the panel determined that Collins was found by Royer in possession of drugs while acting

irrationally, it held that "The law cannot demand that officers be mind readers." App. 6a. Finally, the court of appeals concluded that at most Royer's decision to take Collins to jail rather than to a hospital was "a simple mistake." App. 6a.

REASONS FOR GRANTING THE WRIT

I

THE PETITION SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT'S RULING THAT AN ARRESTING OFFICER CANNOT BE LIABLE FOR DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS WHEN THERE IS A DRUG OVERDOSE INVOLVED IS IN CONFLICT WITH RULINGS BY THIS HONORABLE COURT AND ANOTHER COURT OF APPEALS.

The Fourth Circuit has established a rule in this case that a police officer who has reason to conclude that a person taken into custody is suffering from a drug overdose may not be found deliberately indifferent to serious medical needs if the person arrested exhibits "no visible external injuries." The rationale of the court of appeals' decision conflicts with a decision by this Honorable Court and another court of appeals and merits review to clarify the important issue of whether or not a constitutional right

exists to medical treatment of an individual in custody that has suffered an overdose of drugs.

This Court has held that deliberate indifference to serious medical needs of prisoners constitutes an "unnecessary and wanton infliction of pain." Estelle v. Gamble, 429 U.S. 97, 104, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, ___ (1976). This includes intentionally refusing or delaying access to medical treatment because "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." Id., 429 U.S. at 104-05, 97 S. Ct. at 290-91. "[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself." Id., 429 U.S. at 104, 97 S. Ct. at 291.

The Tenth Circuit in Garcia v. Salt Lake Co., 768 F. 2d 303 (10th Cir. 1985), applied Gamble to find that deliberate indifference to serious medical needs is shown where a pretrial detainee suffering from an alcohol and drug overdose was provided no medical care although he was suspected of being intoxicated. Id. at 306-307.

Accordingly, a writ of certiorari should be granted to resolve a divergence of law and to provide authoritative guidance regarding the important issue of whether a pretrial detainee not exhibiting visible external injuries, although is

suffering a drug overdose, has the constitutional right to medical care while in pretrial detention.

II

THE PETITION SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT'S HOLDING THAT THERE IS A DISTINCTION BETWEEN EXTERNAL AND INTERNAL INJURY WHEN CONSIDERING WHETHER A SERIOUS MEDICAL NEED EXISTS IS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE ANSWERED BY THIS COURT.

The Fourth Circuit's ruling creates a distinction between known external and internal injuries suffered by a pretrial detainee, which may cause certain constitutional violations to go without remedy because the known injury is not visible to the eye. Thus, the ruling would sanction a policy of not providing medical care and admitting to jail unconscious persons suspected of being intoxicated, that was found in Garcia v. Salt Lake Co., 768 F. 2d 303 (10th Cir. 1985) to be violative of an individual's constitutional rights.

This Court, however, should decide the important question of federal law of whether a constitutional violation exists when there is deliberate indifference to medical care

for a person suffering a serious medical condition that is internal, such as a drug overdose, and not visible external injury.

The court of appeals' decision will allow for pretrial detainees to have their constitutional rights violated when there is no "visible external" manifestation of their serious medical need. Therefore, if a pretrial detainee was known to be suffering serious internal injury and there was deliberate indifference to such serious medical need, the Fourth Circuit's ruling would provide protection to those violating constitutional rights.

The writ should be granted to allow this Honorable Court to decide the important question of federal law concerning whether or not a known or suspected internal serious medical condition, such as a drug overdose, may be excluded as a basis for finding a constitutional violation based upon deliberate indifference to serious medical needs.

CONCLUSION

This case presents a question of federal law that is of substantial importance - whether the failure to provide a medical procedure or treatment to a pretrial detainee suffering from a drug overdose, while in the custody of a police officer, constitutes deliberate indifference to serious

medical needs in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution. If the opinion of the court of appeals is allowed to stand the decisions of courts of appeals will be in conflict. Further, the important issue of federal law regarding whether or not known internal injuries suffered by a pretrial detainee are actionable as constitutional violations should be settled by this Court.

Accordingly, Mrs. Grayson respectfully requests that her petition for writ of certiorari be granted.

Respectfully submitted,

NEIL L. HENRICHSEN
Counsel of Record
HENRICHSEN SIEGEL, P.L.L.C.
1850 M Street, N.W. Suite 250
Washington, D.C. 20036
(202) 293-7766
Attorney for Petitioner

Dated: February 3, 2000

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2835

THELMA VIRGINIA GRAYSON, Administrator of the Estate of Gerald Anthony Collins,

Plaintiff-Appellant,

v.

CARL R. PEED, Sheriff of Fairfax County; M. E. ROYER; FAIRFAX COUNTY BOARD OF SUPERVISORS; UNNAMED AND UNKNOWN SHERIFF'S DEPUTIES; OTHER UNKNOWN POLICE OFFICERS OF FAIRFAX COUNTY,

Defendants-Appellees,

and

TYSON CORNER LLC,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.

Albert V. Bryan, Jr., Senior District Judge.

(CA-98-613-A)

Argued: September 23, 1999

Decided: November 5, 1999

Before WILKINSON, Chief Judge, KING, Circuit Judge, and BUTZNER, Senior Circuit Judge.

* * *

OPINION

WILKINSON, Chief Judge:

On March 25, 1995, Gerald Collins was arrested and transported to the Fairfax County Adult Detention Center. The following day Collins was declared brain dead. Appellant brought suit on behalf of Collins' estate pursuant to 42 U.S.C. § 1983 alleging that the arresting officer, the sheriff in charge of the detention center, and Fairfax County had violated Collins' constitutional rights. The district court granted summary judgment to all defendants. We affirm.

I.

In the early evening of March 25, 1995, two security officers found Gerald Anthony Collins "acting crazy," but apparently not violently, in a men's restroom at the Tysons Corner Mall in Virginia. One of the security officers called 911 and requested an ambulance. Mark Royer, a Fairfax County Police Officer on off-duty employment at the mall, then arrived on the scene. Royer approached Collins as he lay on the floor of the restroom repeating over and over, "I

love everyone." Royer began to handcuff Collins. He resisted. Royer then decided to restrain Collins in the SIT (Subject Immobilization Technique) position. Other police officers arrived. Royer and another officer searched Collins' backpack. They found two film canisters — one contained marijuana and the other what they believed to be PCP. Royer then arrested Collins.

Collins was taken to a police van and transported to the Fairfax County Adult Detention Center (ADC). At the ADC a magistrate issued arrest warrants charging Collins with possession of marijuana and PCP. An ADC deputy then booked Collins. Throughout this period Collins was acting irrationally, his speech was slurred, and he kept repeating in an intoxicated manner, "I can't believe this is all over a traffic ticket." Collins was then taken into a cell and strip searched. Royer observed the search in order to take possession of any contraband. At the conclusion of the search Collins attempted to crawl out of his cell. A struggle ensued and Royer and one of the ADC deputies sprayed Collins with pepper spray. The deputies were ultimately able to push Collins back into the cell. The rest of the night passed without incident.

At around 5:30 the next morning, Collins was again acting belligerently. Collins was sticking his arm through the food slot of his cell. Officers on the scene ordered Collins to get his hand back in his cell. He refused. In an attempt to distract Collins, one of the officers opened the door of his cell slightly. Collins reacted by jamming his foot in the doorway. While several officers kept force on the door to ensure that it could not be opened any further, officers attempted to spray Collins with pepper spray. The decision

was then made to move Collins to another cell. A five-man cell extraction team first pinned Collins face down. During the course of the struggle Collins was punched seven to nine times. Once restrained, the officers carried Collins face down to an adjoining cell. Collins continued to act violently. As a result, the officers moved Collins to yet another cell and placed him in four-point restraints.

A few minutes later Collins appeared to be unconscious. Medics checked his pulse on two occasions and observed that he was okay. Another officer then noticed that Collins was not breathing. CPR was initiated and Collins was taken to Fairfax Hospital. At the hospital, a neurologist found Collins to be brain dead. The next day, Collins was taken off life support and pronounced dead.

Thelma Grayson, Collins' mother and administrator of his estate, filed suit against a variety of defendants under 42 U.S.C. § 1983. She also filed state law claims of negligence, gross negligence, and negligent training and supervision. The district court granted summary judgment to all defendants on the § 1983 claims and declined to exercise supplemental jurisdiction over the state claims. Grayson now appeals the grant of summary judgment on the § 1983 claims against Officer Royer, Sheriff Carl Peed (the sheriff in charge of the ADC), and Fairfax County. We address appellant's claims against each defendant in turn.

II.

A.

Appellant first challenges Officer Royer's decision to take Collins to the ADC rather than to a hospital. Appellant argues that this decision reflected a "'deliberate indifference to[Collins'] serious medical needs'" and thus violated the Due Process Clause of the Fourteenth Amendment. *Martin v. Gentile*, 849 F.2d 863, 870-71 (4th Cir. 1988) (quoting *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976)).

We disagree. In order to establish a claim of deliberate indifference to medical need, the need must be both apparent and serious, and the denial of attention must be both deliberate and without legitimate penological objective. *See Martin*, 849 F.2d at 870-71. In this case there was no objective evidence available to Officer Royer at the time of the incident that Collins had a serious need for medical care. *See Belcher v. Oliver*, 898 F.2d 32, 35 (4th Cir. 1990). While appellant has now brought forward an expert witness to testify that Royer should ideally have "committed [Collins] to a medical facility," the expert's opinion is nothing more than impermissible 20/20 hindsight. *See Graham v. Connor*, 490 U.S. 386, 396 (1989). For at the time of their encounter, Collins exhibited to Royer no visible external injuries. He did not have trouble breathing. He was not bleeding, was not vomiting or choking, and was not having a seizure. Furthermore, Collins was conscious, at least somewhat responsive, and able to answer questions.

Collins did have an enlarged heart and had previously been diag nosed with congestive heart failure. But the only person on the scene who knew this information was Collins himself. Collins did not inform Officer Royer or any other officer involved of this prior medical history. The law cannot demand that officers be mind readers. The medical circumstances that led to Collins' death did not even manifest themselves until the following morning, more than ten hours after Officer Royer decided to take Collins to the ADC rather than to a hospital.

Moreover, Officer Royer could reasonably conclude that taking Collins to the ADC would not prevent him from receiving needed medical attention. The ADC had trained medical personnel on duty 24 hours a day. On the evening in question, Jose Laborde, an army-trained practical nurse and a Virginia licensed correctional health assistant, was on duty. Further, Officer Royer alerted the ADC staff of Collins' possible PCP intoxication. Royer was, therefore, in no sense deliberately indifferent to Collins' medical needs.

Deliberate indifference is a very high standard— a showing of mere negligence will not meet it. *See Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976). At the most, Officer Royer's decision to take Collins to the ADC rather than to a hospital was a simple mistake. But the Constitution is designed to deal with deprivations of rights, not errors in judgment, even though such errors may have unfortunate consequences. This is precisely why the Supreme Court has seen fit to stress that deliberate indifference requires "more than ordinary lack of due care for the prisoner's interests or safety." *Whitley v. Albers*, 475 U.S. 312, 319 (1986); *see*

also Farmer v. Brennan , 511 U.S. 825, 835-36 (1994). To lower this threshold would thrust federal courts into the daily practices of local police departments.

Collins' claim illustrates this very risk. His is unfortunately a typical case. His symptoms hardly distinguish him from the multitude of drug and alcohol abusers the police deal with everyday. Collins was found in possession of drugs while acting irrationally and slurring his speech. However, an officer could hardly be faulted under *Estelle* for believing that Collins needed nothing so much as to sleep it off. To accept appellant's claim would be to mandate as a matter of constitutional law that officers take all criminal suspects under the influence of drugs or alcohol to hospital emergency rooms rather than detention centers. That would be a startling step to take.

B.

Appellant would next hold Sheriff Peed liable under§ 1983 for his role in running the ADC. Appellant argues that the policies, customs, and training at the ADC were inadequate and that these shortcomings caused Peed's employees to be deliberately indifferent to Collins' serious medical needs and to use excessive force against Collins. This claim fails for a variety of reasons, most notably because Peed's officers have not violated any of Collins' constitutional rights. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

None of Sheriff Peed's officers was deliberately indifferent to Collins' medical need either at the time of

booking or during his custody at the detention center. Laborde, a trained medic, was on hand in the booking area. He found Collins calm and discerned no sign of any medical problem. The subsequent actions of ADC officers hardly amount to deliberate indifference. Appellant argues that the officers were deliberately indifferent to Collins' medical needs by twice failing to clean pepper spray off of Collins in a timely manner. But the failure to wash the pepper spray off Collins after its first use was due to Collins' own intransigence. Although an ADC officer offered to wash the spray off, Collins responded by yelling and kicking at the officer. And, Collins was rushed to the hospital within such a short time after the second use of pepper spray that ADC personnel could not reasonably be expected to have cleaned off the residue.

Appellant's claim that ADC officers used excessive force against Collins also fails. The force applied by ADC officers was "'in a good faith effort to maintain or restore discipline,'" and thus not violative of the Due Process Clause of the Fourteenth Amendment. *See Taylor v. McDuffie*, 155 F.3d 479, 483 (4th Cir. 1998) (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). For example, Collins' attempt to force his way out of the cell after being strip searched necessitated the use of pepper spray. Collins also initiated the food slot incident. He stuck his arm through the slot, thereby posing a danger to officers who might walk by his cell. He refused to relent, even after repeated entreaties. Collins was then able to jam his foot in the doorway of his cell. The subsequent restraining measures were necessary to subdue Collins.

In dealing with such agitated detainees prison officials must not be forced to walk a tightrope and face the prospect of a lawsuit no matter which way they turn. *See Gooden v. Howard County* , 954 F.2d 960, 967 (4th Cir. 1992) (en banc). If officers attempt to restrain a detainee such as Collins, they risk an excessive force claim. On the other hand, if they fail to restrain such a detainee they could be subject to another lawsuit brought by other detainees or even the obstreperous detainee himself. *See Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (prison officials can be held liable for failing to protect one prisoner from harm caused by other prisoners); *Lee v. Downs* , 641 F.2d 1117, 1121 (4th Cir. 1981) ("[P]rison officials have a duty to protect prisoners from self-destruction or self-injury."). Here the officers obviously felt the need to to prevent Collins from hurting himself. If we failed to accord due deference to the officers' efforts, we would give encouragement to insubordination in an environment which is already volatile enough.

Even if there were constitutional violations committed by one of his employees, Sheriff Peed still could not be held liable as appellant has not pointed to any actionable deficiency in Sheriff Peed's policies, customs, or training. For example, appellant complains that there was "no official policy regarding whether to send in cell extraction teams when an inmate refused to either close a food slot or return a food tray." This absence of a food tray policy, appellant says, manifests deliberate supervisory indifference. Sheriff Peed, however, was well within his rights to leave the managing of such daily mishaps of institutional life to the discretion of correctional officials. It will often be the case that policy guidance cannot replace the exercise of individual judgment

in handling a difficult situation as it arises. The blend of policy guidance and discretionary judgment that goes into the difficult task of prison management must be foremost a penological decision rather than a judicial one. Moreover, state correctional guidelines often exceed constitutional requirements and appellant's own expert penologist conceded that Peed's policies met the standards of both the Virginia Board of Corrections and the American Correctional Association. And even if these guidelines were not always followed, appellant's alleged isolated infractions hardly satisfy her "heavy burden of proof" in showing Peed's "continued inaction in the face of documented widespread abuses." *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994) (internal quotation marks omitted).

Appellant's claims that Peed provided inadequate training for his employees must also fail. As of the time of this incident, the ADC had been accredited for more than ten years by both the American Correctional Association and the National Commission on Correctional Health Care, two organizations whose training requirements often surpass minimal constitutional standards. Moreover, appellant has not explained how any deficiency in training "actually caused" a constitutional violation of any sort. *City of Canton v. Harris*, 489 U.S. 378, 391 (1989). Given Collins' drug use, cardiac condition, and violent propensities, it is not clear that any amount of training would have prevented his death.

C.

Appellant's claims against Fairfax County also fail. As there are no underlying constitutional violations by any individual, there can be no municipal liability. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). Additionally, there can be no county liability here because under Virginia law Fairfax County has no control over the internal administration of the ADC. *See Strickler v. Waters*, 989 F.2d 1375, 1390 (4th Cir. 1993). Rather, the State Board of Corrections tells Sheriff Peed what he has to do in running the jail, and the State Department of Criminal Justice Services tells the Sheriff what he must do to train his employees. *See* Va. Code Ann. § 53.1-68(A)-(C) (Michie 1998). As the county has no control over policy within the jail, it bears no concomitant responsibility. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978).

III.

The death of any detainee is a sad occurrence. But neither Officer Royer, Sheriff Peed, nor Fairfax County can be held responsible for the PCP ingestion and cardiac condition that apparently led to this unfortunate event. The judgment of the district court is hereby

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

THELMA VIRGINIA GRAYSON, Administrator of the Estate of Gerald Anthony Collins,	)
Plaintiff,	)
v.	)
	Civil Action No. 98-613A
CARL R. PEED, SHERIFF OF FAIRFAX COUNTY, et al.	)
Defendants.	)

ORDER

This action comes before the court on defendants' motions for summary judgment. Upon consideration of the parties' submissions, and for the reasons stated in a memorandum opinion this day entered, it is hereby

ORDERED that:

1. Both motions for summary judgment are GRANTED as to all federal claims (counts I through V), which are dismissed with prejudice;

2. The remaining state claims (counts VI through VIII) are dismissed without prejudice:

3. Defendant Peed's motion for attorney's fees is

DENIED (the court awarding no such fees to either moving party);

4. This action is dismissed.

_____

Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
November 20, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

THELMA VIRGINIA GRAYSON,	)
Administrator of the Estate of	)
Gerald Anthony Collins,	)
	)
Plaintiff,	)
	)

v.)
Civil Action
No. 98-613A
)
CARL R. PEED, SHERIFF OF)
FAIRFAX COUNTY, et al.)
)
Defendants.)
)

MEMORANDUM OPINION

In this action, plaintiff Thelma Grayson sues Carl Peed ("Peed"), Sheriff of Fairfax County, the Fairfax County Board of Supervisors ("Fairfax"" or "County"), and M.E. Royer ("Royer"), formerly an officer with the Fairfax County Police, for the death of plaintiff's son, Gerald Anthony Collins ("decedent"), and African American male who died while in custody of the Fairfax County Police. Decedent was arrested on March 25, 1995, while acting in a disorderly manner in the men's room of Hecht's department store in the Tysons Corner Mall in McLean, Virginia. Decedent was originally detailed by store security guards, who then called the Fairfax County Police and an emergency medical team.

The arresting county police officers included defendant Royer and others, who restrained decedent while he was speaking unintelligibly and was unresponsive to Officer Royer's questions. Although Collins was not violent at first, defendants claim he began to struggle when Royer tried to handcuff him.

After Royer handcuffed Collins, but before Collins was removed from the restroom, Royer and another officer found marijuana and what they believed to be Phencyclidine, or "PCP," in decedent's backpack. Plaintiff alleges that during this arrest, Royer used excessive force in violation of the Fourth Amendment, then showed disregard for decedent's medical needs when Royer canceled the request for the emergency medical team.

Defendant Royer and the other officers then carried decedent to a police van and transported him to the Fairfax County Adult Detention Center ("ADC"), where he was processed ans strip searched pursuant to standard police procedures. Decedent continued to act violently, causing the police (including Royer) to spray decedent with pepper spray. The police then placed decedent in hand and leg restraints and put him in a padded holding cell, S-2, for his safety and that of the ADC staff. A few minutes later, an officer came by to wash the pepper spray off decedent, but when he yelled at the officer, he left decedent to deliver medicines to other inmates. That officer came back again to wash the pepper spray off decedent, but when decedent kicked his cell door and continued shouting, the officer went away. Plaintiff alleges that the officer's failure to wash the pepper spray off decedent was negligent or grossly negligent and showed deliberate indifference to decedent's health and violated his right to proper medical care under the Fourteenth Amendment.

The next morning, at around 5:30 a.m., decedent continued to act belligerently, and, having apparently been

released from restraints, was sticking his hands out of the food slot of his cell. The ADC officers again used pepper spray on decedent, but that was insufficient to stop him from attempting his exit.

The officers then assembled an "extraction team," which donned protective clothing and a shield, entered decedent's cell, restrained him, and moved him briefly to an adjoining cell, s-1. Because decedent continued action violently, the officer in charge decided to move decedent to another cell, R-32, where he could be placed in four-point restraints.

The ADC officers quickly carried decedent to R-32, where he was placed face-down in four-point restraints. A few minutes later, at approximately 6:05 a.m., decedent appeared to be unconscious. An officer examined decedent and found that he was breathing and has a pulse, and so left him alone. However, a few minutes later, another officer examined decedent and found that he was not breathing. ADC personnel initiated CPR and called an emergency medical squad, which tool decedent Collins to the Fairfax County Hospital Emergency Room.

At the hospital, medical personnel tried to revive decedent Collins but were unsuccessful. Although they managed to revive his heart, a brain scan revealed little or no brain activity. At approximately 2:00 p.m. that day, decedent was pronounced "brain dead." He was then placed on life support until the next dat, March 27, 1995, when the life support was removed and decedent was pronounced dead.

Plaintiffs initially filed this action in Fairfax county Circuit Court on January 23, 1998, alleging constitutional and state law claims against various defendants, including those here. Defendants removed the case to this court on April 30, 1998. Plaintiff alleges five violations (counts I through V) pursuant to 42 U.S.C. § 1983 for various violations of decedent's constitutional rights (e.g., use of excessive force and denial of medical treatment), and posits three common law claims (counts VI through VIII) for negligence, gross negligence, and negligent training and supervision (respectively).

All parties to this action are citizens or entities residing in Virginia, and all events related to this action occurred in this state. This court has federal question jurisdiction over all plaintiff's § 1983 claims pursuant to 28 U.S.C. § 1331, and has the discretion to exercise supplemental jurisdiction over plaintiff's three state (common law) claims pursuant to 28 U.S.C. § 1367. Defendants here move for summary judgment on all claims.

Standard for Summary Judgment

Summary judgment is appropriate only when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the court is not to weigh the evidence, but rather must determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). In so doing, the court must view the underlying facts in the

light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. V. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and of establishing — based on the relevant portions of the pleadings, depositions, affidavits, if any, answers to interrogatories, and admissions on file — that there is no genuine issue of material facts. Celotex Corp. V. Catrett, 477 U.S. 317, 323 (1986). The nonmoving party must go beyond the pleadings and must, by its own affidavits and by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. Id. at 324.

There is no genuine issue for trial where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. Matsushita, 475 U.S. at 587. The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. Id. At 586. Material facts are those facts whose determination will affect the outcome of the lawsuit, and an issue of material fact is genuine if the evidence is such that a reasonable jury could find for the nonmoving party. Anderson, 477 U.S. at 248.

Discussion

The court now examines the claims against each defendant, namely the County, Royer, and Peed in that order. Defendant Fairfax County's primary defense is that under

Virginia law, it is not liable for any alleged § 1983 violation by Sheriff Peed, who is an independent constitutional officer and not an employee of the County. See Strickler v. Waters, 989 F.2d 1375 (4th Cir. 1993), cert. denied, 510 U.S. 948 (1993). The County thus argues that it is entitled to summary judgment on all claims against it. Plaintiff disagrees and relies significantly upon May v. Newhart, 822 F. Supp. 1233, 1235-36 (E.D. Va. 1993) (J. Williams), in which this court held that in Virginia, a city may be liable for the denial of medical treatment to an inmate (or detainee) by a city jail that is run by a sheriff.

The court begins by noting — quite importantly — that Strickler is binding on this court while May is not (with all due respect to the court in May). Furthermore, the Strickler court stated clearly that a local government's responsibility — and liability — for a jail extends only to the jail's physical plaint, not to the activities within it. 989 F.2d at 1389. Based on that finding, this court finds that, as a matter of law, the County is not a proper party in a § 1983 action against defendant Peed (or his employees, including Royer). See Himple v. Moore, 673 F. Supp. 758, 759 (E.D. Va. 1987) (County was "not the proper party" in a § 1983 suit against a sheriff); Sherman v. City of Richmond, 543 F. Supp. 447, 449 (E.D. Va. 1982) (municipality was not liable in a § 1983 suit against a sheriff). The court therefore dismisses all plaintiffs' § 1983 claims against defendant Fairfax County.

In regarding to defendant Royer, the court will first examine plaintiff's excessive force claim (count I) and then

claims that Royer improperly denied decedent medical treatment out of deliberate indifference to him (counts II and III, respectively). The court begins be noting that under Sieger v. Gilley, 400 U.S. 226, 232 (1991), a plaintiff must show that a defendant breached a "clearly established" constitutional right. In the words of the Fourth Circuit, liability attaches only when a "bright line" is crossed. Maciarello v. Sumner, 973 F.2d 295, 293 (4th Cir. 1992), cert. denied, 506 U.S. 1080 (1993).

First, regarding excessive use of force, the court must evaluate plaintiff's claim that Royer used too much force during arrest under the Fourth Amendment standard established in Graham v. Connor, 490 U.S. 386 (1989). This requires that the court determine whether a reasonable officer would have used such force in those same circumstances without resorting to determinations based on 20/20 hindsight. 490 U.S. at 395-97. Under this standard, the court finds that Royer's actions during arrest were reasonable, and that the degree of force he used did not rise to the level of a constitutional violation.

Plaintiff's excessive force claim for actions taken while decedent was in detention must be conducted under the Fourteenth Amendment. This test has objective and subjective components. Taylor v. McDuffie ('Taylor) 155 F.3d 479 (4th Cir. 1998). The objective component looks to whether the alleged wrongdoing was objectively harmful enough to establish a constitutional violation. Norman v. Taylor, 25 F.3d 1259, 1262 (4th Cir. 1994). To meet the components of this test, a plaintiff must show more than a

de minimis injury. Taylor, 155 F.2d at 483-84. Even assuming that all plaintiff's allegations are true, the court finds that none of Royer's actions, even his (potentially) excessive use of pepper spray, rises to this level.

The subjective component of the test in Taylor looks to whether the force was applied in good faith, i.e., in an effort to maintain or restore discipline, rather than maliciously or sadistically. Id.; Williams v. Benjamin, 77 F.3d 756, 761-63 (4th cir. 1996). The court finds that, based on the record, Royer's actions were taken in good faith to control him, not punish him. The court therefore grants Royer summary judgment on count I.

In regard to counts II (denial of medical treatment in violation of § 1983) and III (deliberate indifference to serious medical needs in violation of §1983), plaintiff must prove that Royer acted with deliberate indifference in deciding not to get medical treatment for decedent. See Estelle v. Gamble, 429 U.S. 97, 104-06 (1976); Martin v. Gentile, 849 F.2d 863, 870-71 (4th Cir. 1988). Royer is accused of denying treatment when he (1) canceled the ambulance called for decedent when he was first arrested, and (2) took decedent tot he ADC rather than to a hospital.

The court finds that neither decision showed deliberate indifference toward decedent's health. At the time, decedent had no obvious physical problems and merely appeared to be "high" on PCP. Had decedent been in convulsions, been bleeding profusely, or in shock (for example), that would be another matter. Decedent was not. The court finds that neither determination by Royer rose to

the level of deliberate indifference, and so grants Royer summary judgment as to counts II and III.

The only federal claims that remain are against Sheriff Peed, who was responsible for running the ADC and establishing its policies. Plaintiff alleges that Peed's policies and procedures were deficient and condoned or failed to prevent: (1) the excessive use of force against decedent under count I; (2) the inappropriate denial of medical care under count II; and (3) fostered the deliberate indifference to decedent's medical condition under count III. Plaintiff further alleges that Peed failed to train officers and adopt proper policies under count IV, and failed to provide an adequate facility at ADC under count V.

Plaintiff's excessive force claim here not only involves Royer's use of force, but the use of force by ADC personnel against decedent Collins the day after he was arrested (i.e., on March 26, 1995). This includes the officers' decision to use pepper spray and other force to remove Collins from the food clot in his first cell (S-2), their retraining Collins in his second cell (S-1), and their decision to transfer him to R-32 and place him in restraints.

The court finds that none of the force used was excessive under the standard in Williams. 77 /f.3d at 761-63. On the contrary, the ADC guards had to remove Collins from the food slot in his cell in order to prevent him from (possibly) grabbing persons passing by his cell. The record also shows that the ADC personnel used adequate

force to restrain decedent Collins, but no more.[1] Because the court finds that no excessive force was used, it renders moot plaintiff's count I claim against Peed, and so grands him summary judgment on that claim. See City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986) (per curiam) (where city was sued because it was legally responsible for its police, the city is not liable if the police are found to have inflicted no constitutional injuries).

Plaintiff's denial-of-medical-car claims (counts II and III) against Peed not only involved Royer's refusal to grant decedent medical care, but the ADC's failure to wash the pepper spray off decedent on two occasions. The record shows that ADC personnel tried to wash the spray off decedent Collins after he was restrained the night of March 25, but he yelled and kicked at the officer who offered to do so.

The following morning, ADC personnel had little or no time to wash the pepper spray off decedent until they examined him in cell R-32, by which time Collins appears to have had a heart attack.[2] The court finds that none of the

---

[1] The court again finds that the use of pepper spray here did not rise to the level of excessive force.

[2] Plaintiff's expert, Michael Baden, M.D., believes decedent died of accidental asphyxiation when he was carried from S-1 to R-32. However, the weight of the evidence indicates that Collins had a diagnosed heart problem — discovered during another PCP incident in 1990 — and that he died of

ADC personnel showed deliberate indifference to decedent's medical needs. Because the court finds no constitutional violations under counts I, II and III, the court grants defendant Peed summary judgment on those claims. See Heller, 475 U.S. at 799.

In regard to plaintiff's claim that Peed's inadequate policies gave rise to these alleged violations, the court finds no constitutional violations and so finds that plaintiff has no constitutional challenge to Peed's policies.[3] As a matter of law, however, the court finds that the policies at issue were constitutionally sufficient, and do not demonstrate "deliberate indifference" toward persons such as decedent Collins. See City of Canton v. Harris, 489 U.S. 378, 386-87 (1989); Hoy v. Simpson, et al., C.A. No. 96-726-A (E.D. Va. April 7, 1997) (finding that less extensive detention policies in Loudon County were constitutionally acceptable); see also, Boyd v. Harper, 702 F. Supp. 578, 581 (E.D. Va. 1988) (finding no deliberate indifferences by

---

a heart attack.

3

The court here finds that plaintiff has failed to show that, "in these circumstances, further training would have prevented decedent's death. Plaintiff must identify a deficiency in a training program closely related to the injury complained of and must further show that the injury would have been avoided 'under a program that was not deficient in the identified respect.' " Gordon v. Kidd, 971 F.2d 1087, 1097 (4th Cir. 1992) (citing City of Canton v. Harris, 489 U.S. at 391)

county sheriff for failure to train deputies about suicidal detainees in suit by estate of detainee who committed suicide).

In Count V, plaintiff alleges that Peed failed to provide an adequate facility at the ADC in violation of decedent's Fourteenth Amendment rights. The only evidence presented about the ADC's inadequacies is that it was overcrowded at the time Collins was placed there. However, there is nothing in the record that suggests decedent suffered in any way from this overcrowding. The ADC had a padded cell open for decedent's "use," and had other cells open with restraints available (ostensibly for decedent's protection as well as for the protection of the ADC staff). Plaintiff therefore fails to make any casual connection between this overcrowding and decedent's injuries. Therefore, the court grants defendant Peed summary judgment on this claim as well.

Having granted summary judgment on all federal claims against all defendants, the court declines to exercise supplemental jurisdiction over the remaining state claims pursuant to 28 U.S.C. § 1367. The court therefore dismisses counts VI through VIII without prejudice.

As a final matter, defendant Peed moves for attorney's fees and costs.[4] Def. Mot. at 32. The court finds that none of the defendants meet the standard for the

---

[4] Defendants Fairfax County and Royer request "other relief." Def. Mot. At 26; Def. Reply at 20.

awarding of attorney's fees in a § 1983 action in the Fourth Circuit. Introcaso v. Cunningham, 857 F.2d 965, 967 (4th Cir. 1988) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978)). Therefore, that motion for fees and costs is denied.

Conclusion

The court grants defendants summary judgment on all federal claims (counts I through V), and dismisses them with prejudice. The court further dismisses the remaining state claims (counts VI, VII and VIII) without prejudice. Defendant Peed's motion for attorney's fees and costs is denied.

Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
November 20, 1998

(2)

No. 99-1329

Supreme Court, U.S.
FILED
MAR 7 2000
CLERK

In The

Supreme Court of the United States

THELMA VIRGINIA GRAYSON, Administrator of the Estate of Gerald Anthony Collins,

Petitioner,

v.

M. E. ROYER,

Respondent.

On Petition For A Writ Of Certiorari To The U.S. Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID P. BOBZIEN, County Attorney
Counsel of Record
Office of the County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, Virginia 22035-0064
(703) 324-2421

Attorney for Respondent

March 7, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20PP

RESTATEMENT OF QUESTION PRESENTED

WHETHER THE FOURTH CIRCUIT CORRECTLY HELD THAT ROYER WAS NOT DELIBERATELY INDIFFERENT TO ANY SERIOUS MEDICAL NEED OF GERALD ANTHONY COLLINS WHEN COLLINS DID NOT EXHIBIT ANY SIGN OR SYMPTOM OF ANY SERIOUS MEDICAL CONDITION OR ASK FOR ANY MEDICAL ASSISTANCE AT ANY TIME WHILE COLLINS WAS IN ROYER'S CUSTODY, WHEN IN FACT COLLINS DID NOT HAVE A SERIOUS MEDICAL CONDITION UNTIL OVER EIGHT HOURS AFTER THE ADULT DETENTION CENTER HAD ASSUMED COLLINS' CUSTODY FROM ROYER, WHEN ROYER KNEW THAT THE ADC HAD PARAMEDICAL PERSONNEL ON DUTY AROUND THE CLOCK AND SCREENED INCOMING INMATES FOR SERIOUS MEDICAL CONDITIONS, AND WHEN ROYER HAD ADVISED THE ADC UPON COLLINS' ADMISSION THAT COLLINS WAS PROBABLY UNDER THE INFLUENCE OF PCP?

TABLE OF CONTENTS

Page

RESTATEMENT OF QUESTION PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iii

RESTATEMENT OF JURISDICTION..... 1

RESTATEMENT OF THE CASE..... 1

A. The Underlying Events..... 2

REASONS FOR DENYING THE PETITION..... 11

CONCLUSION..... 16

TABLE OF AUTHORITIES

Page

CASES

Estelle v. Gamble, 429 U.S. 97 (1976) 12, 13, 15

Farmer v. Brennan, 511 U.S. 825 (1994) 13

Garcia v. Salt Lake Co., 768 F.2d 303 (10th Cir. 1985) 12, 15

Gooden v. Howard County, 954 F.2d 960 (4th Cir. 1992) (*en banc*) 15

Grayson v. Peed, 195 F.3d 692 (4th Cir. 1999) 13, 14

Harris v. District of Columbia, 932 F.2d 10 (D.C. Cir. 1991) 15

Martin v. Gentile, 849 F.2d 863 (4th Cir. 1988) 13

Whitley v. Albers, 475 U.S. 312 (1986) 13

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 ..... 2 n. 2

RULES

Rule 10 of the Supreme Court 12

Rule 15 of the Supreme Court 2

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondent, Mark E. Royer ("Royer"), by counsel, respectfully represents that the judgment of the U.S. Court of Appeals for the Fourth Circuit ("Fourth Circuit") is plainly correct and, therefore, the Court should deny the petition for a writ of certiorari of the petitioner, Thelma Virginia Grayson ("Grayson").

RESTATEMENT OF JURISDICTION

This Court has jurisdiction to consider the Petition for a Writ of Certiorari under 28 U.S.C. § 1254(1).

RESTATEMENT OF THE CASE

This case arises from the arrest of the decedent of the petitioner, Gerald Anthony Collins ("Collins"), for possession of marijuana and phencyclidine (PCP) by Royer, a Fairfax County (Virginia) Police Officer, at approximately 7:00 p.m., on Saturday, March 25, 1995, and Collins' subsequent incarceration at the Fairfax County Adult Detention Center ("ADC") on the evening of March 25, 1995, and on the morning of Sunday, March 26, 1995. At approximately 6:00 a.m. on the morning of March 26, 1995, sheriff's deputies found Collins was not breathing in his cell at the ADC.[1] Despite the fact that the deputies

[1] In Virginia, the Sheriff, who is an independent constitutional officer under state law, is the jailer. Carl Peed

immediately began cardiopulmonary resuscitation (CPR) and had Collins promptly transported to Fairfax Hospital, Collins died on March 27, 1995, after termination of life support.

Because Grayson's Statement of the Case, in particular, The Underlying Events, Petition at 3-9, does not fairly and accurately summarize the record before the Fourth Circuit and, in particular, omits material facts not genuinely in dispute in favor of Royer, Royer sets forth this Restatement of Facts.[2] Rule 15.2 of the Rules of the United States Supreme Court.

A. The Underlying Events

On March 25, 1995, Royer was working an approved secondary off-duty law enforcement job at an arcade in Tysons I mall in Fairfax County, Virginia. Royer was in uniform and had a police department portable radio on

---

("Peed"), then the Sheriff of Fairfax County and the City of Fairfax, was in charge of the ADC. Grayson named Peed as one of the defendants. The Fairfax County Police Department is a non-*sui juris* department of the government of Fairfax County, Virginia. Grayson also named the County's Board of Supervisors ("County") as a defendant. Although the District Court granted, and the Court of Appeals affirmed, summary judgment in favor of the County and Peed, as well as in favor of Royer, Grayson only seeks a writ of *certiorari* with respect to the judgment in favor of Royer.

[2] In her Proceedings Below, Petition at 8-9, Grayson also does not fairly present the basis for the Court of Appeals' judgment. This will be addressed under the Reasons for Denying the Petition, *infra*. The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

his person and a police cruiser at the mall. At approximately 7:00 p.m., the Public Safety Communications Center ("PSCC") dispatched Royer to a possible mental disturbance case in the men's room in the Hecht's store in the mall.

On his arrival, Royer observed Collins lying on his back on the floor of the men's room. There were two Hecht's security guards, Tom Peltier and Jason Moses, in the bathroom with Collins. Collins was shouting, "I love everyone." Royer attempted to talk to Collins. However, Collins' only reaction was to stare at Royer, and then he started chanting what Royer knew from his experiences in the Marine Corps to be some kind of "Islamic phrases."

For his own and Collins' safety, Royer decided to handcuff Collins. Collins resisted being handcuffed, and it took Royer and both security guards to handcuff him. During the struggle, Collins grabbed hold of Royer's portable radio, which was on his belt, and keyed the microphone several times. The PSCC and other officers heard the sounds of the struggle over the radio. Even after being handcuffed, Collins continued to struggle and kick his legs. Royer applied pressure to Collins' legs to control them. About that time, Officers Cole, Pappas, and Wahrhaftig arrived on the scene. When the other officers arrived, Collins' ankles were secured by flexicuffs. Royer secured Collins' ankles to the handcuffs around his wrists by a second set of handcuffs and another set of flexicuffs and placed him on his side.

After the struggle, Collins did not show any signs that he had been injured in any way in the struggle. He was not bleeding. Collins did not show any signs of

having any difficulty breathing before, during, or after the struggle. Collins did not cry out in pain, he did not make any complaint of pain or injury, and he did not request medical assistance.

Collins had a black backpack with him. Royer searched the backpack and found two plastic 35 mm film canisters. One canister contained what Royer knew to be marijuana, based upon his training and experience. The other canister contained parsley that had a strong smell of ether. Royer was not sure what the material was and showed the canister to Wahrhaftig, a more experienced officer. Wahrhaftig told Royer that the parsley smelling of ether was PCP. Based upon his observations of Collins' strange behavior, the violence of his resistance, and his conclusions as to the contents of the two film canisters, Royer decided to arrest Collins for possession of marijuana, a misdemeanor, and possession of PCP, a felony.

Two on-duty supervisors, Sergeants John Vincent Byrd and Greg Smith, also came on the scene. Royer reviewed what had happened, and advised Byrd he intended to charge Collins with possession of marijuana and PCP. Byrd concurred. Byrd also checked Collins. He did not find any signs of injury or any sign that Collins was having any difficulty breathing.[3]

---

[3] In his pre-trial deposition, Byrd explained that his use of the word "overdose" simply meant that Collins had ingested an illegal drug and expressly rejected the implication that his use of the word in that sense implied that Collins was exhibiting any signs or symptoms of a serious medical problem. Dr. Abbot, the ADC physician, in his deposition similarly described any ingestion of PCP as an "overdose" because by definition there was no medically appropriate dose for PCP.

Collins was then transported in a police wagon to the ADC in Fairfax, where there was a magistrate on duty. Two officers carried Collins to the wagon and placed him on his side in the wagon. Officer Wilder drove the wagon to the ADC. Royer drove himself to the ADC in his cruiser.

The ADC was notified by radio through the PSCC that Collins was being brought in and that he was possibly under the influence of PCP. PSCC also requested that deputies at the ADC assist in bringing Collins into the ADC. Upon Collins' arrival at the ADC, Master Deputy Sheriff ("MDS") Layne, MDS Gillette, Deputy Sheriff ("DS") DePoto, and DS Wright met the wagon at the sally port. Layne cut the flexicuffs securing Collins' ankles and connecting them to the handcuffs on his wrists, and Collins walked into the ADC without assistance. Wright secured Collins by a set of handcuffs to a bar near the magistrate's window to await Royer's arrival. According to the deputies, Collins was not bleeding, having any difficulty breathing, or exhibiting any other sign or symptom of a medical problem. He did not ask for medical assistance, and he did not complain of having any medical problem.

Royer arrived at the Magistrate's Office a few minutes after Collins. Royer spoke to Collins in the waiting area. At this time, Collins appeared normal. Collins confirmed that he had taken PCP. In response to Royer's questions, Collins provided his name, address, telephone number, age, date of birth, and other identifying information. Collins was not bleeding, having any difficulty breathing, or exhibiting any other sign or symptom of a medical problem. He did not ask for medical assistance,

and he did not complain of having any medical problem. Royer advised the deputies that he had to use force to arrest Collins and that they should use caution because Collins was unpredictable and under the influence of PCP.

The magistrate issued arrest warrants charging Collins with possession of marijuana and possession of PCP, set bond, and committed him to jail. Royer served the warrants on Collins at approximately 8:36 p.m.

After the warrants had been served, DS Bennett booked Collins into the ADC. As part of the booking process, Bennett completed a medical screening form. Because Collins appeared to be under the influence, in accordance with Sheriff's Department procedures, DS Corporal Laborde, a correctional health assistant, evaluated Collins during the booking process.

Laborde had been employed as a correctional health assistant in the ADC since October 15, 1992, following his honorable discharge from the U.S. Army as a Sergeant, where he served for over 13 years, as a medical specialist, a pharmacy specialist, and as a practical nurse. He not only held the Army's Expert Field Medical Badge, he was certified as an instructor for that rating. Laborde's medical training in the Army included training about drug reactions, including PCP, and actual service in emergency rooms, where he had dealt with patients under the influence of PCP. Dr. Jack Daniel, one of Peed's experts, a forensic pathologist and a former Army Medical Corps Lieutenant Colonel, was familiar with army medical training. He opined that Laborde was well qualified to assess Collins' condition upon admission to the ADC.

Laborde was called to the booking area around 9:00 p.m., and he observed and listened to the exchange between Collins and Bennett. Laborde believed Collins to be on some type of a drug. However, Collins was answering Bennett's questions appropriately. Collins answered "no" to most of the questions on the screening form and was angry about being in jail. On average, Laborde observes 15 prisoners a day being booked. In his experience, it is not unusual for an inmate to be "unhappy" and "angry" while they are being booked into jail.

Based upon his observations, Laborde did not believe that there was any reason not to admit Collins into the ADC. According to Laborde, had he observed anything that he thought would have indicated that Collins should have been refused admittance into the ADC, he would have told Bennett.

The Sheriff's Department's procedures require that whenever a person is admitted to the ADC on weapons or drug charges, he or she is strip-searched. The arresting police officer remains while the deputies conduct the search so that he or she can take immediate possession of any evidence or contraband discovered during the search.

The deputies took Collins to an isolation cell, S-2, to conduct the search. Layne and Gillette conducted the search while DePoto and Wright held Collins. During the search, Royer remained in the corridor outside of the cell. When the search was over, Collins was told to remain on the floor while the deputies left the cell. As Wright and DePoto were leaving the cell, Collins all of a sudden yelled, "I'm not staying here," and lunged toward the door on all fours. Collins grabbed hold of the door and

the doorjamb while DePoto and Gillette attempted, without success, to close the door. Collins got his head and shoulders out of the cell and continued to pull himself out of the cell. Throughout the incident, Collins ignored the deputies' verbal commands to go back into his cell. Layne struck Collins' shoulder three times with his foot, and Wright struck Collins' fingers with his foot in an unsuccessful effort to get Collins to release his grip. Wright sprayed Collins twice with pepper spray, without apparent effect. Collins continued to pull himself out of the cell. Royer then sprayed Collins with his pepper spray. Collins reacted by shaking his head and blinking his eyes and going onto all fours. Royer ceased spraying, and the deputies were able to push Collins back into the cell.

Deputy Sheriff Lieutenant Carroll, the on-duty shift supervisor, called for a medic to evaluate Collins and decontaminate him as necessary. Laborde came to cell S-2, with sterile water and gauze, observed Collins, and attempted to talk to him through the cell window. Laborde identified himself as a medic and told him he needed to clean his eyes and asked him if he would allow him to do so. However, Collins refused and became verbally abusive. Based upon his observations of Collins' behavior, Laborde determined that Collins was not suffering from the effects of the pepper spray.

The incident with Collins at approximately 9:10 p.m. on March 25, 1995, was Royer's last contact with Collins.

The deputies observed Collins at 15-minute intervals during the night. He was given water at 11:00 p.m. and 1:00 a.m. He was given his clothing back at 12:30 a.m.

Laborde checked on Collins shortly after midnight and again around 3:00 a.m. Laborde again tried to talk to Collins by use of the intercom, but Collins was still angry and would not cooperate. S-2 was one of several cells used for isolating agitated prisoners, and Collins was placed there for his own protection.

At approximately 5:30 the next morning, March 26, 1995, while the deputies were attempting to give Collins breakfast, Collins put his hand and arm in the food slot on the cell door and out into the corridor. Despite verbal commands from the deputies, Collins refused to take his hand out of the food slot and after attempts to convince him to do so had failed, the cell door was opened slightly in an attempt to distract Collins.

Instead, Collins managed to get his foot wedged in the doorway and refused to remove it despite the efforts of several deputies. Despite the use of pepper spray, Collins continued to inch his way out of the cell. Carroll ordered several deputies to put on protective gear and to enter the cell to control Collins. They succeeded in controlling Collins and then moved him temporarily to the adjoining cell, S-1. Collins continued to be aggressive in S-1, and Carroll then decided that Collins should be restrained in 4-point restraints in cell R-32 and he was again moved. Collins was conscious and resisting during the move from S-1 to R-32.

After Collins had been restrained in R-32, Laborde and another medic examined Collins. Both medics determined that Collins was in no distress. However, shortly thereafter, a deputy found that Collins was unresponsive. The deputies immediately commenced CPR and called

911. Collins was rushed to Fairfax Hospital by ambulance. However, he died on March 27, 1995 at 12:30 a.m.

Based upon his training and experience as a Fairfax County police officer, Royer knew that the ADC had trained paramedical personnel on duty 24 hours a day, that prisoners were medically screened prior to admission to the ADC, and that the deputies at the ADC would refuse to accept prisoners with medical problems without medical clearance.[4]

Contrary to the impression given by Grayson's Statement of the Case, Petition at 7, Dr. Field's autopsy report was not the only medical evidence before the Fourth Circuit and the District Court.

According to Grayson's own expert, Michael M. Baden, M.D., a forensic pathologist, the levels of PCP found in Collins' liver and blood on autopsy were too low to be a cause of death, and he specifically rejected the idea that PCP was the cause of death. Instead, Dr. Baden's theory as to cause of death was that at some point while the deputies were carrying Collins from S-1 to R-32, Collins was asphyxiated accidentally. Dr. Baden also agreed that at the time Laborde observed Collins during the booking process, there was no problem. Dr. Baden did state that he thought a "mental health professional" should have evaluated Collins, although he was not clear

---

[4] As part of his training at the police academy, Royer spent a day in the ADC observing the operations of each of the different stations in the ADC.

what a mental health professional would have done beyond talking to Collins.[5]

Dr. David Abbot, the ADC physician from 1978 to 1996 who had extensive experience with inmates under the influence of drugs, opined without contradiction that PCP requires time to leave the body, that there are no drugs that can be used to treat persons under the influence of PCP, that PCP, unlike some drugs, such as alcohol or heroin, does not have a withdrawal syndrome presenting medical problems, and that the inmate requires restraints away from other prisoners. There was no evidence in the record that PCP ingestion always creates a substantial risk of a serious medical condition or that it does so in a significant percentage of cases.

Dr. Jack Daniel opined, again without contradiction, that Collins did not exhibit any sign or symptom of any serious medical condition until he had been found unresponsive on the morning of March 26, 1995.

REASONS FOR DENYING THE PETITION

The Fourth Circuit correctly found that Royer had not been deliberately indifferent. At no time while Collins was in Royer's custody did Collins exhibit any sign or report any symptom of a serious and immediate medical

[5] Although, as discovery in the lawsuit uncovered, Collins did have a history of substance abuse, there was no evidence that Collins ever had a history of mental health problems. In any event, Collins was not in the mood for a quiet consultation on the evening of March 25, 1995.

problem. In fact, Collins did not show any sign or symptom of any serious medical condition at all until approximately 6:00 a.m. the next morning, more than eight hours after Royer had passed custody of Collins to the ADC and his last contact with him.

Review on a writ of *certiorari* is not a matter of right, but of judicial discretion, and a petition will be granted only for compelling reasons. Rule 10 of the Rules of the Supreme Court. Grayson argues that the Fourth Circuit's decision in this case conflicts with this Court's decision in *Estelle v. Gamble*, 429 U.S. 97 (1976), and the decision of the Court of Appeals for the Tenth Circuit ("Tenth Circuit") in *Garcia v. Salt Lake Co.*, 768 F.2d 303 (10th Cir. 1985). Petition at 9-11; *see* Rule 10(a) of the Rules of the Supreme Court. She further argues that the Fourth Circuit had created a distinction between known external injuries and internal injuries suffered by a pretrial detainee and that this distinction had created an "important question of federal law" that this Court should review. Petition at 11-12; *see* Rule 10(c) of the Rules of the Supreme Court.

Neither argument survives reading what the Fourth Circuit actually said in its decision, what this Court said in *Estelle*, or what the Tenth Circuit said in *Garcia*. Both arguments are refuted by what the Fourth Circuit actually said as opposed to Grayson's highly selective quotation from the opinion.

Grayson never articulates how the standard stated by the Fourth Circuit conflicts with the standard set forth in *Estelle* because she cannot. Instead, she argues that the Fourth Circuit's decision is in conflict with *Garcia*, which also applied the *Estelle* standard. The Fourth Circuit held

that "to establish a claim of deliberate indifference to medical need, the need must be both apparent and serious, and the denial of attention must be both deliberate and without legitimate penological objective," *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999), App. to Pet. at 5a (*citing Martin v. Gentile*, 849 F.2d 863, 870-71 (4th Cir. 1988). The court noted that deliberate indifference is a very high standard and that a showing of mere negligence will not meet it. *Id.* at 695, App. to Pet. at 6a (*citing Estelle*, 429 U.S. 104-106; *Whitley v. Albers*, 475 U.S. 312, 319 (1986) and *Farmer v. Brennan*, 511 U.S. 825, 835-36 (1994)).

The Fourth Circuit found first of all that:

> [T]here was no objective evidence available to Officer Royer at the time of the incident that Collins had a serious need for medical care.

Grayson, id. at 695, App. to Pet. at 5a.

The Court further noted that:

> For at the time of their encounter, Collins exhibited to Royer no visible external injuries. *He did not have trouble breathing. He was not bleeding, was not vomiting or choking, and was not having a seizure. Furthermore, Collins was conscious, at least somewhat responsive, and able to answer questions.*
>
> Collins did have an enlarged heart and had previously been diagnosed with congestive heart failure. But the only person on the scene who knew this information was Collins himself. Collins did not inform Officer Royer or any other officer involved of this prior medical history. The law cannot demand that officers be mind readers. *The medical circumstances that lead*

> *to Collins' death did not even manifest themselves until the following morning, more than ten hours after Officer Royer decided to take Collins to the ADC rather than to a hospital.*
>
> Moreover, Officer *Royer could reasonably conclude that taking Collins to the ADC would not prevent him from receiving needed medical attention.* The ADC had trained medical personnel on duty 24 hours a day. On the evening in question, Jose Laborde, an army-trained practical nurse and a Virginia licensed correctional health assistant, was on duty. Further, Officer *Royer alerted the ADC staff of Collins' possible PCP intoxication.* Royer was, therefore, in no sense, deliberately indifferent to Collins' medical needs.

Id. at 695; App. to Pet. at 6a. (underlined portions quoted by Grayson in Petition; italics, emphasis added).

Grayson's reliance on *Garcia* is misplaced to say the least. First, there is a significant factual difference between these two cases. In *Garcia*, unlike this case, the decedent had an obvious and apparent serious medical condition – he was unconscious. Second, *Garcia* did not even address the issue presented here: whether an arresting police officer was deliberately indifferent to the serious medical needs of an arrestee. The issue before the Tenth Circuit in *Garcia* was Salt Lake City's contention that it should not be held liable for deliberate indifference to serious medical needs when the jury had returned verdicts in favor of all of the individual defendants on the same claim. The verdicts in favor of the individual defendants were not challenged on appeal. In fact, it is not even clear from the opinion in *Garcia* that the arresting officer or officers had even been named as defendants.

The Fourth Circuit's decision in this case is not in conflict with either *Estelle* or *Garcia*.

Grayson's second argument is also refuted by what the Fourth Circuit actually said as opposed to the isolated words and phrases quoted by her out of context. The Fourth Circuit did not create any dichotomy between internal or external injuries or any new standard for evaluating claims of deliberate indifference to serious medical needs. It based its decision on the signs and symptoms, more specifically, the lack thereof, that could have been observed by a police officer and the conclusions that he or she would draw from them.

Finally, it should be noted that Royer also had raised the defense of qualified immunity. Neither Court below reached this issue because both had found there was no constitutional violation. Based upon the facts known to Royer, interpreted in light of his training and experience, a reasonable police officer in his position could reasonably believe that by taking the steps which Royer took, he was not being deliberately indifferent to a serious medical need of Collins. As a result, even if there had been a constitutional violation, Royer would be entitled to qualified immunity. *See Gooden v. Howard County*, 954 F.2d 960, 967-968 (4th Cir. 1992) (*en banc*); *see also Harris v. District of Columbia*, 932 F.2d 10 (D.C. Cir. 1991).

CONCLUSION

As noted by the Fourth Circuit, Collins' death was a sad occurrence. However, Royer was not deliberately indifferent to a serious medical need of Collins. The decision of the Fourth Circuit is consistent with the decisions of this Court and is not in conflict with the decisions of other courts of appeal. This case does not present any significant federal question. For the foregoing reasons, the Court should deny Grayson's petition for a writ of *certiorari*.

Respectfully submitted,

DAVID P. BOBZIEN
Counsel of Record
County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035
(703) 324-2421

Attorney for Respondent

Dated: March 7, 2000